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ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS

Report of the Secretary-General

Addendum

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* Reissued for technical reasons.

JAPAN

[Original: English]

[17 July 1991]

1. The Government of Japan very much appreciates the efforts of the Governments of Austria and Czechoslovakia in making the detailed proposal regarding the additional protocol as a contribution to the progressive development and codification of international law.

2. At the same time, Japan is of the view that the additional protocol, including the question as to the need for such a document, should be thoroughly examined in the Sixth Committee through the exchange of views of Member States. Japan, for its part, intends to participate in that effort.

3. In the light of the above, Japan believes that the following points require study:

(a) The purpose of and need for the protocol:

(i) Reasons why the additional protocol is needed:

a. The fact that there are now more than 200 bilateral treaties regarding consular functions suggests that the rules in article 5 on consular functions of the Vienna Convention are inadequate;

b. In view of the fact that such bilateral agreements are common among like-minded developed countries, but rare among developing countries, and that small developing countries in particular experience difficulties because there are no treaty rules that they can apply to consular functions, do the realities of consular functions in developing countries in fact require this additional protocol?

(ii) Conformity between the additional protocol and the more than 200 bilateral agreements already existing. (Considering the various legislative differences among countries, is it possible to devise an additional protocol that is both specific and generally applicable? Also, if, for example, the substance of the additional protocol does not affect the rules already laid down in the existing bilateral treaties, can it really be effective?)

(iii) According to the explanatory memorandum prepared by Austria and Czechoslovakia, the draft of the additional protocol enumerating consular functions is not exhaustive and those functions not dealt with should continue to be determined by the law of custom. Thus the additional protocol as formulated does not represent a fundamental change from the regulations as contained in article 5 of

the Vienna Convention; can it therefore be expected to clarify fully consular functions?

(iv) Inherent in the preparation of this additional protocol is there not a danger, in effect, of charging the receiving country with new duties that were not provided for in the Vienna Convention on Consular Relations, of imposing additional burdens on consulates and ultimately of impeding the functioning of consulates?

(b) Is it in fact the case that inherent in article 5 of the Vienna Convention on Consular Relations there are such shortcomings as a lack of clear rules regarding consular functions? If so, what, specifically, are they? In particular, in the course of the deliberations of the International Law Commission at the drafting stage of that Convention there were extensive discussions as to whether to define consular functions in a general manner or to define them by enumerating them, and it was ultimately decided to define the main functions in comparative detail. Further, similar discussions were conducted in the Conference on Consular Relations that was held for the purpose of preparing that Convention, and the Conference adopted the draft prepared by the International Law Commission, it may therefore be necessary to consider thoroughly why the deliberations concerning the rules of consular functions contained in that Convention took that approach.

4. Japan's comments regarding the specific contents of the draft additional protocol are as follows:

(a) The provisions of the draft additional protocol may be thought of as an attempt to regulate more specifically and apply more clearly article 5 (consular functions) and article 36 (communication and contact with nationals of sending States) of the Vienna Convention on Consular Relations. On the other hand, articles 12 and 15, among others, of the protocol contain elements that may be thought of as imposing additional duties on the receiving State (for example, the duty under article 12 to notify the consulate when it intends to take coercive measures against a foreign vessel and the duty under article 15 to forward promptly any communication from a convict addressed to his or her consulate (art. 36, para. 1 (b), of the present Convention provides for only communications from detained persons awaiting judgement));

(b) Among the rules in the draft additional protocol:

(i) It is provided that consular officers shall fulfil new functions with regard to matters for which, depending on the country, they heretofore have not been responsible (for example, art. 3, para. (d), provides that consular officers shall have the right to "authenticate documents issued by the competent authorities of the receiving State and destined for use in the sending State" (at this time Japanese consular officers do not fulfil this function);

(ii) It is also provided that consular officers be required to be thoroughly apprised of the domestic law within the receiving State

(for example, according to the regulations in art. 4, para. (a), should a resident in a foreign country enter into a commercial agreement and present it to the local authorities, a consular officer, acting as notary, has the right to validate it; in doing so, the officer is required to be thoroughly informed of the local registration and other laws);

(iii) There are rules regarding actions that, according to practice widely followed by individual countries until now, consular officers have not been expected to take (for example, according to the regulations under art. 4, para. (c), consular officers can be requested to certify general commercial agreements, something that has been done in countries mainly by a notary public or by the chamber of commerce and industry);

(c) The phrase "consular officers shall have the right to" in articles 3 and 4 is confusing, since the elements it refers to are those which may be considered to be duties of the consular officers;

(d) Inasmuch as the additional protocol is supplementary to the Vienna Convention on Consular Relations, it is necessary to stipulate that only the States party to the Vienna Convention may sign (ratify and accede to) the additional protocol. (The actual provisions of arts. 17-19 of the additional protocol are unclear; for example, the phrase "may become" in art. 17 and art. 19 should be deleted.)